BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JERRY GLEESON, JR.	)	
Claimant	)	
VS.	)	
	)	Docket No. 262,232
BFI WASTE SYSTEMS	)	
Respondent	)	
AND	)	
	)	
INSURANCE COMPANY STATE OF PENNSYLVANIA	)	
Insurance Carrier	)	

ORDER

Respondent appeals the May 2, 2002 preliminary hearing Order of Administrative Law Judge John D. Clark. Claimant was granted benefits after the Administrative Law Judge found that claimant's back problems were aggravated by his work for respondent. Claimant was further granted treatment with Allyson A. Hatfield, M.D., as the authorized treating physician, and past medical benefits were ordered paid.

ISSUES

(1) Did claimant suffer accidental injury arising out of and in the course of his employment with respondent on the date or dates alleged?

(2) Did claimant submit timely written claim?

(3) Did claimant submit timely notice?

(4) Did the Administrative Law Judge lack jurisdiction to order all medical bills paid when no bills were introduced at the hearing?

(5) Did the Administrative Law Judge lack the jurisdiction to reverse the previous Appeals Board Order of June 6, 2001, when the claim was found to be not compensable, and based upon the evidence presented, without ruling on the other compensability issues?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board (Board) finds that the Order of the Administrative Law Judge should be reversed.

This matter originally came to the Board from the March 29, 2001 preliminary hearing Order entered by Administrative Law Judge Clark. At that time, Board Member Duncan A. Whittier reversed the Administrative Law Judge, finding that claimant had failed to prove that he suffered accidental injury arising out of and in the course of his employment.

The matter was again presented to the Administrative Law Judge at the preliminary hearing of April 30, 2002. The resulting Order is before this Board.

Claimant worked for respondent and its predecessor companies for ten and a half years. His main duties as a lead man in the container repair shop included stacking carts after they were cleaned. These carts weighed approximately 40 to 50 pounds. Claimant was provided assistance whenever his back was bothering him and when he requested it.

Claimant suffered from long-term back problems as a result of his preexisting dwarfism, a congenital condition that affects the spine. This condition is genetic and is the same condition suffered by claimant's father.

On January 24, 2000, claimant stopped working for respondent because of back pain and numbness in his legs. Claimant alleges his symptoms were worsened by his regular work duties with respondent. However, at the time of his termination, claimant filled out two documents which indicated that claimant's termination was due to other than his work duties. The Application for Family or Medical Leave signed by claimant on January 26, 2000, indicated his reason for leaving was arthritis in the back. Claimant also applied for both short-term and long-term disability at the time of his departure from respondent's employment. The disability claim forms specifically ask whether the illness or injury was related to claimant's occupation and whether claimant was going to file a workers' compensation claim. Claimant answered no to those questions. That claim form, Respondent's Exhibit 3 to the preliminary hearing of March 13, 2001, was dated June 1, 2000.

Claimant alleges he advised respondent of his ongoing back problems and the fact that they were related to his employment. However, claimant also acknowledged at the time of his termination he did not advise respondent that he was alleging a workers' compensation claim. Claimant did testify that he told Dan Stuhlsatz, the shop manager, of his back problems and was advised by Dan to talk to Brad Green, the safety manager.

Claimant thought this occurred in 1995 or 1996. However, respondent's division vice president Jim Spencer testified that Mr. Green did not work for respondent in 1995 or 1996. Mr. Green, however, was there in 1992, when claimant suffered an injury when he fell off a ladder. That accident and injury, however, are not part of this claim. Additionally, there were no forms created or accident reports requested at the time of the 1995 or 1996 alleged conversations.

After terminating his employment, claimant sought medical treatment from several doctors. His medical bills were presented to his personal health insurance carrier for payment, indicating that claimant did not consider the condition to be work related.

Claimant's treating physician, Allyson A. Hatfield, M.D., an internal medicine specialist, advised in her letter of March 12, 2001, to claimant's attorney that she was unable to relate claimant's problems to the specific job requirements claimant performed at BFI.

After the Administrative Law Judge found the matter compensable and that decision was reversed, the matter was presented to the Administrative Law Judge at the follow-up preliminary hearing of April 30, 2002. At that time, the reports of Charles D. Pence, M.D., from the Wichita Clinic, were presented to the Administrative Law Judge for consideration. Claimant was referred to Dr. Pence for the purpose of determining the cause of claimant's ongoing back problems. Dr. Pence did find that claimant's employment was an aggravating factor to his ongoing problems. However, the work history provided to Dr. Pence indicated that claimant had been doing heavy labor, on a garbage truck, for a number of years. This history is inaccurate, as claimant did not work on a garbage truck, but instead worked in respondent's plant, where he cleaned empty trash carts and stacked them.

The Administrative Law Judge, in the May 2, 2002 Order, found the opinion of Dr. Pence to be persuasive. There was no comment by the Administrative Law Judge regarding the inaccurate history provided to Dr. Pence. Claimant was asked if Dr. Pence had been provided any medical reports from the numerous doctors who had examined and treated claimant over the years. Claimant testified that he thought his doctor would provide those, but there is no indication from Dr. Pence's report that he was provided any medical evidence from any of the other treating physicians.

MRIs taken of claimant's spine in November of 1996, when compared to MRIs taken in September of 2000, show little difference in claimant's spinal condition. Both show degenerative disc disease from L1 through S1. The MRIs show mild diffuse bulging beginning at L1 and continuing through L5 in November 1996, and at L1 and continuing through S1 in September 2000. Both show severe spinal stenosis present with narrowing of the interpedicular distance in the spine. The 2000 MRI notes that claimant's spinal stenosis is unchanged.

Claimant acknowledges that at the time he departed his employment on January 24, 2000, he did not advise respondent or any of its employees that he was alleging this to be a work-related accident. The first notice provided to respondent that a workers' compensation claim was being filed came in the form of a written demand letter dated January 12, 2001, received by respondent on January 16, 2001, from claimant's attorney.

The Workers Compensation Act places the burden of proof on claimant to establish his right to an award of compensation and to prove the conditions upon which that right depends by a preponderance of the credible evidence. *See* K.S.A. 1999 Supp. 44-501 and K.S.A. 1999 Supp. 44-508(g). In this instance, the only medical evidence different from that earlier considered by the Board are the medical reports of Dr. Pence. As is noted above, the work history provided to Dr. Pence is inaccurate in that it portrays claimant doing heavy labor on a garbage truck for a period of years. That does not accurately describe the work claimant performed for respondent over his ten-and-a-half-year history there.

The opinion of claimant's treating physician, Dr. Hatfield, states that she is unable to relate claimant's problems to the specific job requirements claimant performed with respondent. When considering medical opinions, a doctor's understanding of the work duties performed by the claimant would be critical in assisting that doctor to form an opinion regarding what did or did not cause claimant's ongoing difficulties. The Board finds the information provided to Dr. Pence, with its inaccuracies, would not allow Dr. Pence to formulate an accurate opinion regarding what did or did not cause or aggravate claimant's condition in his spine. The Board, therefore, finds that claimant has failed to prove that he suffered accidental injury arising out of and in the course of his employment with respondent on the dates alleged. The decision of the Administrative Law Judge in this regard is reversed.

At the preliminary hearing, respondent raised all issues which had been raised at the original preliminary hearing, including the defenses of timely written claim and timely notice. The Administrative Law Judge addressed those in his original decision of March 29, 2001, but made no mention of those issues in his Order of May 2, 2002.

For purposes of appeal, the Board will address those issues in this Order.

Claimant acknowledges at the time he departed his employment with respondent he did not advise respondent that he was claiming a work-related injury. The forms that he filled out for both family or medical leave and his short- and long-term disability benefits failed to mention a work-related connection to his injuries. Claimant's medical treatment was paid for through his health insurance, rather than through workers' compensation, and claimant acknowledges he did not tell his employers of a work-related connection to his back complaints.

K.S.A. 44-520 (Furse) requires notice of the accident, stating the time, place and particulars thereof, be provided to the employer within ten days after the date of the accident. Actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of that notice unnecessary. In this instance, it is clear that respondent was aware claimant suffered from a congenital condition. What is not clear, however, is whether claimant alleged this condition to have been aggravated by his work. The only indication that claimant made any type of workers' compensation claim against respondent comes in the form a Workers' Compensation Investigation Report created on August 4, 1992, by respondent's safety manager, Brad Green, after claimant fell off of a ladder, striking his head on an I-beam. As noted above, that injury is not part of this claim.

The Board finds that claimant has not adequately satisfied the requirements of K.S.A. 44-520 (Furse) and notice was not provided to respondent in a timely fashion.

K.S.A. 44-520a (Furse) requires that written claim be submitted within 200 days after the date of accident or within 200 days after the date the last payment of compensation is provided. The written claim time can be extended to one year from the date of accident if respondent fails to make or cause to be made a report to the Director of the accident, claimed or alleged, within 28 days after the receipt of knowledge of the alleged accident. *See* K.S.A. 44-557 (Furse). In this instance, as the Board has found claimant failed to provide notice to respondent of the accident and that respondent further had no actual knowledge of the accident, the extension of time under K.S.A. 44-557 (Furse) would not apply. Claimant would, therefore, be obligated to present written claim under K.S.A. 44-520a (Furse) within 200 days of the January 24, 2000 last day of employment with respondent, which would be the last possible date of accident under these circumstances. *See* Treaster v. Dillon Companies, Inc., 267 Kan. 610, 987 P.2d 325 (1999). Claimant failed to submit written claim until January 16, 2001, well beyond the 200-day time limit set forth in the statute. The Board, therefore, finds claimant has also failed to provide timely written claim in this instance.

For the above reasons, the Board finds that the Order of the Administrative Law Judge should be reversed and claimant should be denied benefits for the injuries alleged from 1999 through January 24, 2000.

This decision renders moot the issues dealing with claimant's entitlement to medical benefits and whether the Administrative Law Judge lacked jurisdiction to issue the orders contained in the May 2, 2002 decision.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge John D. Clark dated May 2, 2002, should be, and is

hereby, reversed, and claimant is denied benefits for the alleged injuries suffered from 1999 through January 24, 2000, with respondent.

IT IS SO ORDERED.

Dated this ____ day of July 2002.

BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
Kim R. Martens, Attorney for Respondent
John D. Clark, Administrative Law Judge
Philip S. Harness, Director